

**SANITIZED DECS. – 02-623 FN, 02-624 U & 02-625 HP – BY – GEORGE V. PIPER  
– ISSUED 04/17/03**

**SYNOPSIS**

**BROAD-BASED HEALTH CARE PROVIDER TAX AND PURCHASERS' USE TAX – BURDEN OF PROOF NOT MET** – Refusal and/or failure of the Petitioner to provide any meaningful or otherwise exculpatory evidence proving that the assessments are incorrect and contrary to law, in whole or in part, as required by W. Va. Code § 11-10A-10(e), mandates that the same be upheld in toto.

**FINAL DECISION**

This Division of the Commissioner's Office issued a business franchise tax assessment against the Petitioner.

This assessment was for the period of January 1, 1998 through December 31, 2000, for tax and interest, through December 30, 2000, and additions to tax.

Written notice of this assessment was served on the Petitioner.

Also, the Commissioner issued a purchasers' use tax assessment against the Petitioner under the provisions of Chapter 11, Articles 10 and 15A of the W. Va. Code for the period of July 1, 1997 through June 30, 2002, for tax and interest, through June 30, 2002, and additions to tax.

Written notice of this assessment was served on the Petitioner.

Also, the Commissioner by its Division issued a broad-based health care provider tax assessment against the Petitioner under the provisions of Chapter 11, Articles 10 and 27 of the W. Va. Code, for the period of January 1, 1999 through December 31, 2001, for tax, interest, through December 31, 2001, and additions to tax.

Written notice of this assessment was served on the Petitioner.

Thereafter, by mail postmarked, September 27, 2002, the Petitioner timely filed petitions for reassessment.

During the course of the December 4, 2002 hearing it became apparent that Petitioner's counsel was unprepared and that to proceed further would be futile. Whereupon, the administrative law judge ruled that the matter be continued for a period of forty-five (45) days in order for the Petitioner to file certain business franchise tax returns and to obtain necessary invoices.

Prior to reconvening the hearing on February 26, 2003, Petitioner's counsel submitted no business franchise tax returns but did supply Petitioner's 1999 federal (personal) income tax return as well as several invoices billed to Petitioner's corporation.

### **FINDINGS OF FACT**

1. Petitioner's corporation (hereafter "the corporation") is an out-of-state corporation, in good standing, that has never qualified to do business in the State of West Virginia as per the office of the West Virginia Secretary of State.

2. The corporation has two (2) offices out-of-state and one (1) office in the State of West Virginia.

3. Petitioner, as an individual, is licensed to practice medicine only in the State of West Virginia. The corporation is not, however, recognized as such by the West Virginia Board of Medicine.

4. Petitioner considered himself/herself to be an employee of her corporation when providing medical services in the State of West Virginia.

5. Petitioner's out-of-state practice is limited solely to that of forensics and giving testimony by deposition in his/her offices and at trial.

6. During the course of the second administrative hearing commissioner's counsel, upon submittal to this Tribunal that Petitioner had not qualified to do business in West Virginia as a corporation during the audit period, withdrew the business franchise tax assessment leaving only the use tax and broad-based health care related tax assessments to be contested.

7. As per Petitioner's testimony, his/her corporate offices were raided by federal and state law enforcement officers in conjunction with their raid on another doctor's office resulting in all of his/her 1997 through 1999 billings being seized for purposes of investigation, and these billings remain in the hands of said officials and beyond taxpayer's control.

8. At the conclusion of the second hearing the administrative law judge ruled that the record in this case would be kept open no later than March 31, 2003 and that Petitioner must do the following within that time frame to avoid the two (2) remaining estimated assessments from being affirmed:

(a) Petitioner must provide invoices to his/her accountant for the year 2001 so that he can match same against his/her general ledger and bank statements.

(b) Petitioner will contact his/her medical billing company as soon as possible in order to get specific back up information on medical billings for West Virginia versus the out-of-state corporation and to determine what portion of gross receipts pertain to forensics and other non-medical sources, such as giving testimony at depositions or at trial.

Petitioner's accountant would, at a pre-arranged time and place, meet with the Commissioner's tax auditor for the purpose of reviewing the aforesaid documents with the aim of better quantifying the amount of actual income subject to health care provider tax and purchasers' use tax.

On March 28, 2003, the tax auditor sent to the Tax Commissioner's counsel a recap, including supporting documentation, of his post-hearing audit review, as directed by the administrative law judge. This report was then forwarded to the administrative law judge and to Petitioner's counsel.

Because of the specific details contained therein and its applicability to the tax assessments now pending, the conclusory summary is reproduced in full as follows:

- 1) The first information reviewed was a group of bank statements for the period March 9, 2001 through November 30, 2001 (A sample copy of these can be found at "Tab A" of this report).

During the course of the audit, this same information was provided via the CPA's "Detail of Deposits." This schedule is found in the information section of the audit. (A copy of it follows at "Tab A.").

These bank statements represent no new information. Therefore, they represent no basis for adjusting either the use tax or the health care tax.

- 2) Six copies of "invoices" were presented. These were copied and are found at "Tab B." They appear to be the same as presented at the previous hearing. The three "statements" from Company A are yearly recaps, not purchase invoices. The invoice from Company B is dated April 5, 1997. This is prior to the use tax audit period.

These "invoices" as presented offer no basis for possible revision of the use tax assessment.

- 3) An envelope noted "copies of receipts for audit" was presented. This contained a March 17, 2003 letter from CPA's to the taxpayer. This envelope also contained copies of primarily various cash register receipts reflecting retail purchases of such items as placemats, publications, paper clips and some type of clothing articles. There is also a "general purpose" invoice dated "10-24-01" which does not contain a vendor name. The letter and copies of the example "invoices" are found at "Tab C."

Many of the cash register receipts copies are not vendor-specific. Many of the cash register receipts or the other copies of "invoices" presented are not purchaser-specific nor do many

reveal purchases of a medically-related nature usually found for the operation of a physician's office.

This relates to the initial question posed by the auditor in order to verify the purchases noted—for example—on the 1999 (unfiled) federal corporate income tax return's itemization of "line 26—other deductions." A copy of this attachment and page one of the (unfiled) 1999 1120 return was included in the audit and a copy of each is included here at "Tab C."

The above-mentioned March 17 letter from taxpayer's CPA's contains a written notation at the bottom referencing that these "receipts total a certain dollar amount." The (unfiled) 1999 1120 return was prepared (as per the itemization of line 26) including a dollar amount of purchases classified as "Office Expense and Postage" and another dollar amount classified as "Medical Supplies." These total approximately nine times the amount of the "invoices" presented here.

Again, with such scant information provided, no basis for revision of the use tax assessment was found.

- 4) Another envelope was presented noted. This contained the March 17 letter from taxpayer's CPA's with an additional note "Here are Receipts Plus 1 Copy." This envelope contained primarily the same copies of the cash register receipts described in 3) above plus some original cash register receipts/other receipts. Examples of the "Receipts" and a copy of the letter follow at "Tab D."

As in 3) above, the auditor could again find no basis to revise the use tax assessment.

- 5) An envelope noted under the name of taxpayer's CPA's Rec. 2001" was presented. This was the same envelope as presented to the auditor during the initial audit and described in the audit's "Short Memo," Section II. A. (A copy of the memo is found at "Tab E").

Since this was already reviewed during the audit, no basis for any revision of the use tax was found.

One CPA arrived at approximately 11:00 a.m. He presented the "General Ledger" for 2001, "Trial Balance" and "Depreciation Schedule as of 12/21/01" (found at "Tab F"). The CPA stated that it was his understanding of the Administrative Law Judge's instructions that the general ledger for 2001 would be used to make "An Extrapolation Of The Use Tax."

The G/L's account number 618 (Office Expense) was reviewed. A check mark was noted by each purchase that could not be probably excluded (such as department stores). These checked purchases lack a purchase invoice/credit card statement. No opinion as to whether or not sales tax had been paid upon these purchases could be given absent at least some supporting purchase information. Ninety-two percent of the purchases from account number 618 were without any such supporting documentation/probable excludability (See G/L—Page 15).

None of the dollar amount in purchases from account 619 (Drugs & Supplies) were supported by invoice (See G/L—Page 15).

The depreciation schedule (Also at "Tab E") reflects a dollar amount of capitalized computer/computer related purchases during the audit period. The above-mentioned "invoices" for computers/related equipment from a technology company reflect a total of similar equipment of an approximate amount. Therefore, an approximate amount of such purchases is without any supporting purchase information.

Petitioner-taxpayer's CPA offered the following comments:

--CPA stated that the above-noted bank statements could be utilized to determine the receipts for the health care tax base;

--CPA made the following comment about the invoices: "To be honest about it, I didn't have a chance to look at them."

The Auditor asked the CPA if he had anything else to present for review. CPA responded "No."

The auditors left the CPA's office at approximately noon.

In conclusion, and as obviously supported by the above-noted results of the post-audit review, the auditor finds no basis for revising the use tax assessment or the broad-based health care tax assessment as originally submitted in the audit.

## **DISCUSSION**

The sole issue is whether the Petitioner has shown that the two (2) remaining estimated assessments are in fact incorrect and contrary to law, in whole or in part, as required by W. Va. Code § 11-10A-10(e).

At the conclusion of the second administrative hearing, which was necessitated because Petitioner had no evidence to present at the first scheduled hearing, Petitioner was told by the administrative law judge in no uncertain terms that he/she must provide the necessary invoices which he/she said that he/she had for the year 2001, which would in turn be used as a possible test period for the earlier year when invoices were not available. Further, Petitioner was to contact his/her medical billing company for the purpose of receiving specific backup information on his/her medical billings for West Virginia versus that for the out-of-state locations and to determine the amount of income applicable to forensics and other non-medical services.

Unfortunately, Petitioner has refused or otherwise failed to present or provide any exculpatory evidence in support of his/her case, notwithstanding the fact that he/she has had multiple opportunities to do so, leaving this tribunal no alternative but to uphold the assessments in their entirety.

The issues presented in this matter involve the following important rules of administrative agency authority and statutory construction. Initially, it is important at

all times to recognize and to give more than just “lip service” to two general points: (1) rather than utilizing a so-called “de novo” scope of review, deference is to be given to the expertise of the administrative agency, even with respect to an “issue of law,” when that issue of law is one within the peculiar expertise of the administrative agency; and (2) any applicable legislative regulation does not merely reflect the administrative agency’s position but, instead, has been legislatively reviewed and approved, has exactly the same force and effect as a statute, and is, therefore, subject to the usual, deferential rules of statutory construction, see Feathers v. West Virginia Board of Medicine, 211 W. Va. 96, 102, 562 S.E.2d 488, 494 (2002).

The following specific points flow from these general points. “[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the reviewing [tribunal] is whether the agency’s answer is based on a permissible construction of the statute.” Syllabus point 4, in relevant part, Appalachian Power Co. v. State Tax Department, 195 W. Va. 573, 466 S.E.2d 424 (1995) (emphasis added). Similarly, “the Tax Commissioner [or the West Virginia Office of Tax Appeals] need not write a rule [or an administrative decision] that serves the statute in the best or most logical manner; he [, or she, or the Office of Tax Appeals] need only write a rule [or a decision] that flows rationally from the statute.” Id., 195 W. Va. at 588, 466 S.E.2d at \_\_\_\_ (emphasis added). Thus, “[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.” Syllabus point 3, Shawnee Bank, Inc. v. Paige, 200 W. Va. 20, 488 S.E.2d 20 (1997) (internal citation omitted) (emphasis added). Finally, “courts will not override administrative agency decisions, of whatever kind, unless the decisions contradict some explicit constitutional provision or right, are the results of a flawed process, or are either

fundamentally unfair or arbitrary.” Appalachian Power, 195 W. Va. at 589, 466 S.E.2d at \_\_\_\_ (quoting Frymier-Halloran v. Paige, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995)).

### **CONCLUSION(S) OF LAW**

Based upon all of the above it is **DETERMINED** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. See W. Va. Code § 11-10A-10(e).
2. The Petitioner-taxpayer in this matter has failed to carry the burden of proof with respect to the issue of whether the estimated assessments are clearly excessive.

### **DISPOSITION**

**WHEREFORE**, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the broad-based health care provider tax assessment issued against the Petitioner for the period of January 1, 1999 through December 31, 2001, for tax, interest, updated through April 15, 2003, and additions to tax, should be and is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the purchasers' use tax assessment issued against the Petitioner for the period of July 1, 1997 through June 30, 2002, for tax, interest, updated through April 15, 2003, and additions to tax, should be and is hereby **AFFIRMED**.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the business franchise tax assessment issued against the Petitioner for the period of January 1, 1998 through December 31, 2000, should be and is hereby **VACATED**, and the Petitioner owes no further business franchise tax liability for the period in question.